

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TOERING ELECTRIC COMPANY,
AND FOSTER ELECTRIC, INC.

Case Nos. 7-CA-37768
7-CA-39093
7-CA-39205

and

LOCAL UNION NO. 275, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO

A. Bradley Howell, Esq.,
for the General Counsel.

Peter J. Kok and Gary A. Chamberlin, Esqs.,
(Miller, Johnson, Snell & Cummiskey, P.L.C.),
of Grand Rapids, Michigan,
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on April 28-May 1, and on July 16 and 17, 1997. The charge in case 7-CA-37768 was filed on October 12, 1995, the charge in 7-CA-39903 was filed on October 11, 1996 and the charge in 7-CA-39205 was filed on November 15, 1996. The complaint consolidating all three cases was issued on January 30, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondents, I make the following

Findings of Fact

I. Jurisdiction

Respondent Toering, a corporation, is an electrical contractor with offices in Grand Rapids, Michigan. Respondent Foster, a corporation, is an electrical contractor with offices in Muskegon, Michigan. Toering and Foster, individually and separately, annually purchase and receive goods and materials valued in excess of \$50,000 directly from points outside of the State of Michigan. Toering and Foster admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Overview

The General Counsel alleges that Respondents, Toering Electric and Foster Electric are a single employer within the meaning of the Act. David Toering is the President and majority stockholder of both companies. The General Counsel alleges that on August 22, 1995, Respondents refused to interview and consider James Jendrasiak for hire because of his union affiliation and activities.

The General Counsel alleges that Respondents refused to interview and consider Mr. Jendrasiak for hire on or about September 25, 1995, for the same reasons. In June, 1996, Jendrasiak, by then a full-time organizer, responded to newspaper advertisements on two occasions by submitting employment applications to Toering Electric for himself and three other union members. These resumes were received by Toering on June 10 and 27, respectively. On July 29, 1996, Jendrasiak responded to additional advertisements by resubmitting the four resumes along with 14 other resumes. Toering Electric received these resumes on August 3, 1996. Toering did not contact any of the 18 employees, including Jendrasiak. The General Counsel alleges that Respondents have refused to hire and/or consider for hire each of the 18 union members whose resumes it received because of their union affiliation and to discourage employees from engaging in protected union activity.

The historical relationship of Toering, Foster and the IBEW

David Toering established Toering Electric Company, a commercial and industrial wiring firm in about 1973. Toering Electric does business primarily in the Grand Rapids area. David Toering owns 60% of the company's stock and his wife owns the remaining 40%. Aside from David Toering, the company's principal management officials are Ward Stahmer, operations manager, Dennis Van Wyck, office manager/accountant, Tom Powers, purchasing agent, and Cliff Pollema, estimator.

In 1989, David Toering purchased Foster Electric, an electrical contracting company which had been in business for over ten years. Foster's office is in Muskegon, 50 miles west of Grand Rapids. Foster's business is primarily in the Muskegon area; however, at times Toering Electric and Foster have projects in close geographical proximity to each other. David Toering is president of both companies and owns 70% of the stock in Foster Electric. Fifteen percent of the remaining shares are owned by Bruce Bartels, Foster's office/operations manager. The other 15% of the stock is owned by Fred Fairchild, Foster's field superintendent/project manager.

David Toering is actively involved in the management of Toering Electric and Foster Electric. For example, David Toering makes the final decisions with regard to the 401(k) plans and group health insurance for both companies. Otherwise, the two firms do not have the same management and personnel.¹ Both companies loan and borrow electricians from each other but they also borrow and loan electricians from and to other non-union contractors². The charge for loaning an employee between Foster and Toering Electric appears to be

¹ Bruce Bartels worked for Toering Electric from 1985 - 1990. In 1990 he bought the Foster stock of Shane Toering, David Toering's son. When Bartels went to work for Foster, Shane Toering went back to work with Toering Electric.

Foster's corporate secretary, Mary Broucek, works out of the offices of Toering Electric in Grand Rapids (Tr. 199).

² Toering has borrowed employees from DePree Electric Company, a contractor which has a relationship with the Christian Laborer's Association, a union not affiliated with the IBEW.

substantially identical to the charges assessed other contractors.³ When he is looking for electricians to hire, Foster's office manager, Bruce Bartels, generally checks with Toering's office manager, Dennis Van Wyck (Tr. 210).

5 Toering provides some degree of administrative assistance to Foster Electric. This is primarily in the form of tax and other financial services from Dennis Van Wyck, Toering Electric's accountant/office manager. Van Wyck, for example, manages Foster's 401(k) plan and group health insurance. Toering Electric charges Foster for these services.

10 Toering and Foster are both non-union and are members of the Associated Builders and Contractors (ABC). The IBEW attempted to organize Toering in the early 1980s and lost an NLRB election. In 1994, David Toering became aware that the IBEW had targeted his companies for a "salting" organizing campaign. In 1994, the IBEW filed unfair labor practice charges against Toering. These charges were settled and as a result Toering offered jobs to
15 six Union members in July and August 1995. Four of these never responded to the offer.⁴ The other two were interviewed by Toering and sent for pre-employment physicals. They were then told when they should start work but never showed up at the Toering jobsite. Other IBEW members received back-pay in the settlement.⁵

20 *Jim Jendrasiak's August 22, 1995 job application to Toering through American Careers*

On Sunday, August 20, 1995, American Careers, a job placement agency, ran an advertisement in *The Grand Rapids Press* for journeymen and apprentice electricians in the Muskegon area. The ad did not divulge the name of the prospective employer. This ad was
25 placed pursuant to contractual arrangements with David Toering, who told John Williams, the American Careers service manager, that he was seeking journeymen for Toering Electric and Foster.

Two days later, James Jendrasiak went to American Careers' office in Grand Rapids to
30 respond to the advertisement. At the time Jendrasiak was a journeymen electrician. He was also an unpaid member of the executive board of Local 107 and a voluntary organizer. At about this time he had been laid off by his employer, Kemco Electric Company.

At American Careers, Jendrasiak filled out an application and then was interviewed by
35 John Williams. His application listed his prior employers as Kemco, Mellema Electric, Reynolds Metals and Spencer Redner. Jendrasiak also indicated that he had been self-employed from February 1994 to February 1995, which was not true.

Williams interrupted the interview to call David Toering. Toering asked Williams where
40 Jendrasiak acquired the hours needed to become a journeyman. Williams went back to

³ However, in 1995, Toering loaned Foster the services of William Brooks, a temporary employee working for Toering through American Careers, an employment agency, without charging Foster anything. It did so without clearing the loan with American Careers (Tr. 242-
45 44).

⁴ One of these, Geralyn Spofford, is an alleged discriminatee in the instant case. See G.C. Exh. 61r and R. Exh. 75.

⁵ It is not clear from this record whether the charges were filed by Local 275 in Muskegon or Local 107 in Grand Rapids, or both. The individuals mentioned in this record were Local 275 members. On July 1, 1996, Local 107 merged with Local 275, and ceased to exist as a separate entity.

Jendrasiak who told him that he served his apprenticeship at Buist Electric and Spencer/Redner Electric companies. Williams called Toering again. Toering asked Williams if Jendrasiak had any union background and directed him to find out whether any of Jendrasiak's prior employers were ABC members.

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Williams returned and asked Jendrasiak if any of the companies he worked at to get his journeyman's rating, such as Spencer/Redner, were union shops. Jendrasiak either said no or avoided answering the question. He did tell Williams that he did not think Spencer/Redner was an ABC member. Williams then arranged for Jendrasiak to be interviewed almost immediately by David Toering. While Jendrasiak was on his way to the Toering offices, Williams contacted Kemco and discovered that it was a union contractor. He immediately called Toering and apprised him of this fact. Toering told Williams to continue checking Jendrasiak's references.⁶

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When Jendrasiak arrived at the Toering Electric offices, he was met by Dennis Van Wyck, Toering's office manager. Van Wyck told him that there had been some misunderstanding, that David Toering was not available and that Jendrasiak should call American Careers.

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After talking to Williams, Jendrasiak filled out a Toering employment application on which he indicated that he was a "voluntary union organizer." David Toering called Williams back and told him that he had "some bad dealings with these guys before in the past and did not want to have to interview " Jendrasiak (Tr. 458-9). Before leaving Toering Electric, Jendrasiak had a brief conversation with David Toering, who told him he had applied for a job with American Careers, not with his company.⁷ Jendrasiak had no contact with American

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⁶ Williams called Buist Electric and found that it had no record that Jendrasiak had worked there. Jendrasiak testified that he worked at Buist through a labor broker, rather than directly for Buist.

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⁷ David Toering denied saying anything to Williams other than expressing disapproval of Williams' decision to send Jendrasiak to his office without first clearing it with Toering Electric. He testified that he also told Williams that he couldn't read the faxed version of the application filled out by Jendrasiak at American Careers. I credit Williams' testimony that he had telephone conversations with Toering while he was talking to Jendrasiak at American Careers' offices. I credit Williams' testimony that David Toering asked him to inquire whether Jendrasiak had worked for union contractors to acquire his journeyman status and whether these companies were ABC members. I also credit Williams' statement that Toering told him he didn't want to interview Jendrasiak because he had had trouble with these guys (meaning the Union) before. Williams appears to have been a completely neutral witness with no reason to fabricate his testimony. Moreover, his testimony is corroborated by Jendrasiak and a surreptitious tape made by Jendrasiak of his conversations with Williams (Exhs. General Counsel-54, 55). Respondent relies (brief at page 9) on the fact that on August 22, Williams told Jendrasiak that Toering's lack of interest in him had nothing to do with his union background. Williams' testimony at the hearing establishes just the opposite. Moreover, one would hardly expect Williams to tell Jendrasiak on August 22, about his conversations with David Toering.

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The sequence of events described above does not precisely comport with the testimony of any one of the witnesses. I infer from the testimony and the tape, that Williams told Toering that Jendrasiak had come to Kemco through the union hiring hall before Jendrasiak arrived at Toering's offices. If this were not the case Toering would have had no reason for not considering Jendrasiak for the positions available at Foster.

Although Respondent strongly objected to my receipt of the tape and a transcript made of

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Careers after August 22. He was recalled to work by Kemco in early September 1995, and did not contact Toering Electric again until June 7, 1996. During the period from August 22, 1995 through July 1996, Toering Electric did not hire or borrow from other contractors any journeymen electricians. However, it did borrow a number of apprentices during this period.

I infer that David Toering was seeking employees for Foster, as well as for Toering Electric in the August 20 advertisement. I draw this inference because the ad mentioned the Muskegon area and because Toering told John Williams he was seeking employees for both companies. American Careers referred employees to both companies.⁸

Indeed, at the beginning of August, Foster employed Brian Kelly, who it mistakenly thought was a journeyman, through American Careers. On September 11, Kelly was put on the Foster payroll and still works for the company despite an apparent misrepresentation about his status. During the last week of August, Foster began employing Roland Dye, a master electrician as an independent contractor. Dye appears to have worked for Foster on a fairly regular basis through December 1995. Foster also borrowed apprentice electrician Kevin Boley from Toering from August 28 to September 22, 1995.

Jendrasiak's application for employment to Foster through Staffing, Inc.

On September 10, 1995, Jendrasiak saw another advertisement in *The Grand Rapids Press*. The ad run by Staffing, Inc., another temporary employment agency, stated that a Muskegon area company had a need for a journeyman electrician and a third year apprentice electrician. The ad was placed pursuant to a verbal order from Judy Hall, an office clerical at Foster Electric, to Sandy Hammet, the human resources administrator at Staffing, Inc.

The next day Jendrasiak went to Staffing, Inc.'s office, filled out an employment application and was interviewed by Ms. Hammet. Jendrasiak's application listed his prior employment with three union contractors. Additionally, notes made by Hammet on the application indicate that Jendrasiak served his apprenticeship through the IBEW (G.C. Exh. 4(a)-(e)). Sometime later that month, Hammet faxed Foster a copy of Jendrasiak's employment application. She also arranged through Judy Hall for Jendrasiak to be interviewed at Foster.

Jendrasiak called Bartels on the afternoon of September 22. Bartels told Jendrasiak to meet him at a McDonald's restaurant on Tuesday, September 26. Shortly afterwards, Bartels called Sandy Hammet, who was not in her office. She returned the call that afternoon. Bartels told her that he wanted to cancel the interview. He said that Jendrasiak "being affiliated with the union was big trouble. Foster Electric is an open shop and it would be trouble to bring him in." (Tr. 21, G.C. Exh. 4(e)). Bartels did not ask Hammet to refer any other applicants.⁹

the tape, they are clearly admissible. Indeed, it may have been reversible error to reject them, *Plasters' Local 90*, 236 NLRB 329 (1978); *Fontaine Truck Equipment Co.*, 193 NLRB 190 (1971).

⁸ Toering Electric loaned William Brooks to Foster in July, 1995, without approval from American Careers (Exh. General Counsel-6, invoice 009157). This indicates that Toering Electric regarded employees working for it through that agency as being available to work for Foster.

⁹ Bartels confirms that he called Hammet on Friday, September 22, the same day that he set up the interview with Jendrasiak. However, he testified that he spoke with Hammet on Monday, September 25, not the 22nd. More importantly, he denied telling Hammet anything

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On Monday, September 25, a journeyman electrician, Ed Wezeman, an employee of another non-union contractor, Ottawa Electric, reported to Foster's jobsite at the Port City Tool Co. Wezeman worked for Foster for three weeks, all but two days at the Port City Tool job. For Wezeman's services, Foster paid Ottawa \$24.90 per hour. The week after Wezeman returned to Ottawa, Foster borrowed journeyman Ken Slot and apprentice Terry Terpening from Toering. Slot worked for Foster for three weeks and Terpening for four weeks (G.C. Exh. 6, R. Exh. 24). The record does not reflect the name of their jobsite. Another Ottawa employee, apprentice Matt Crum, worked for Foster for 6 1/2 days beginning September 25 (G.C. Exh. 44).

Bartels contends that on Friday, September 22, after he talked to Jendrasiak, Ottawa Electric called him and said that they had a journeymen and an apprentice that they could loan to Foster. Bartels contends further that he had tried to borrow the electricians he needed from other contractors without success before contacting Staffing, Inc. He states Ottawa told him they would look into the situation and their work load, but didn't get back to him until September 22.

I find Bartels' testimony in this regard to be completely unbelievable. It would be an extraordinary fortuitous turn of events for Ottawa to call just after he received the faxed application from Hammet indicating that Jendrasiak was almost certainly a union member. In order to persuade me that such an event occurred independent of the Bartels' realization that Jendrasiak was a union salt, Respondent would need much more than Bartels' self-serving testimony. It would at a minimum have to produce documentary evidence or sworn testimony from Ottawa Electric's management as to the circumstances by which Wezeman, who apparently was not available previously, suddenly became available for Foster's use on September 22. I infer that, upon realizing that Jendrasiak was a union salt, Bartels procured the services of the Ottawa employees so that he would not have to interview Jendrasiak or consider him for employment.¹⁰

The Union's 1996 salting efforts

On June 6 and 20, 1996, Toering Electric advertised for journeymen and apprentice electricians in *The Grand Rapids Press*. These ads did not identify Toering (and are therefore referred to as "blind" ads). James Jendrasiak, who since January 1, 1996, had been a full-time organizer, responded to these advertisements. He sent the resumes of four Union members;

along the lines of "Jim Jendrasiak, union, big trouble.(Tr. 682)." On cross-examination Bartels testified that he did not discuss a union with Hammet at all and that she apparently made up her testimony to that effect (Tr. 687). I credit Hammet over Bartels. There is absolutely no indication that Hammet has any interest in this case at all. She would have no motive for fabricating her testimony. Moreover, her testimony is supported by her contemporaneous note and by the fact that David Toering had expressed similar sentiments to John Williams of American Careers just one month earlier.

¹⁰ Respondent's brief suggests this scenario makes no sense because Bartels already knew Jendrasiak was affiliated with the Union when he originally set up the interview. This it argues he knew from the application faxed by Hammet. However, Hammet's testimony is that she set up the interview with Judy Hall. It is possible that Bartels did not read Jendrasiak's application until after he talked to him. On the other hand, Bartels may have set up the interview at the same time that he was seeking a way out of having to consider Jendrasiak for employment.

Patrick Cosgrove, Bernard Hamstra, Richard Newville and himself, to a post office box. The first packet was received on June 10, the second on June 27. Neither Jendrasiak nor any of the other union members received a response to these submissions.

One month later, on July 28, Toering ran the advertisement again. On July 29, Jendrasiak resubmitted the 4 resumes along with 14 others.¹¹ These resumes had been submitted to the Union's organizers in response to solicitations for resumes to be used to respond to blind advertisements, and were kept on file. Toering received Jendrasiak's submission on August 3.

Jendrasiak's cover letter (G.C. Exh. 61(a)) stated that the applicants were registered electrical apprentices or had passed a Michigan's journeyman's examination. It stated that any protected activity that the applicants may choose to engage in would be conducted in accordance with guidelines established by the NLRB and would not interfere with the efficiency and productivity of the employees. The letter advised of the Union's right to file charges with the NLRB should the recipient refuse to nondiscriminatorily consider the applications and stated further "If for any reason you refuse to accept this applicant or if you consider same deficient in any manner please advise me immediately so that remedial action may be taken."

Dennis Van Wyck, Toering's office manager, testified that he did not respond to the Union's submission because the resumes were xerox copies and not up-to-date. He stated this led him to believe that the applicants weren't interested in employment (Tr. 627). Respondents made no response to any of Jendrasiak's submissions. Toering Electric did not, as it routinely did in other instances, ask any of the Union applicants to supplement their resumes by filling out a Toering application form (See Tr. 625).

Many of the resumes were not current.¹² For some there is no way of telling when they were prepared. However, others clearly indicate fairly recent preparation. For example, the resume of Bernard Hamstra (G.C. Exh. 61(h)) indicates that he took a National Electrical Code course in 1996. John Fekken's resume (G.C. Exh. 61(g)) sets forth his work history through October 1995.

Two of the resumes were from apprentices. The resume of Douglas Scott does not reflect that he has any experience as an electrician and appears to predate his apprenticeship (G.C. Exh. 61(o)). However, one can easily deduce from the resume of Wayne Harris (G.C. Exh. 61(i)) that this applicant is an apprentice. The resume indicates that he has worked for three employers as an apprentice electrician from August 1994 to January 1996.

Toering Electric generally maintains a permanent workforce of between 30 to 35 employees. In peak periods of work it supplements this workforce by a variety of means. It

¹¹ On July 1, 1996 Local 107 and 275 merged. Jendrasiak became an organizer for the new unified local. Jendrasiak obtained thirteen of the 14 new resumes from James Leenhouts, an organizer who worked for Local 275 before and after the merger. Two of the applicants besides Jendrasiak are full-time paid officials of the Union. They are James Leenhouts and George Robinson, Jr.

¹² Toering's reliance of the lack of specificity with regard to the dates that the Union applicants worked for various employers is undercut by the fact that David Lamberts' application suffers from the same defect. Lamberts, who was hired by Toering on July 31, 1996, gave no indication as to when he worked for the employers listed on his employment application (G.C. Exh. 34).

hires employees from temporary employment agencies, borrows employees from other non-union contractors¹³ and in some cases directly hires new employees. The summer of 1996 was one of these peak periods. Filling Toering Electric's needs was complicated by the fact that there has been a shortage of qualified electricians in western Michigan for the past five years.

5 From late June to mid-July Toering brought a number of new employees to its worksites, including the following:

10 Christian Karr, who worked for Toering from June 20 through at least June 28, through Troy Technical Services;

15 Kenneth Palm, a journeyman, who started working for Toering Electric on July 15;

15 Frank Inman, a Missouri journeyman, who worked from July 22-September 4, through Construction Services;

Justin Lake, a temporary employee, who worked from July 23-August 16;

20 Lance Pittlekow, a journeyman, who was borrowed by Toering from Associated Electric Co., on July 18. Pittlekow became a regular Toering employee in November;

Jim McCune, who started with Toering on July 12;

25 John Hagerty, who had a Virginia journeyman's license and was hired by Toering on July 16¹⁴;

30 Clint Zang, who worked 4 days as an independent contractor, beginning on July 29;

David Lamberts, who worked as an independent contractor for a week starting July 31;

35 Matt Hummel, who worked August 5 and 6, through the Talent Tree employment agency;

Josh Akin, who was hired as an independent contractor on August 3;

40 Two journeymen and two apprentices it borrowed from Classic Electric Company during the week of August 26-31 (Exhs. General Counsel-25, 29).

45 Toering did not do any direct hiring between August 3, and September 3, 1996. It explains this fact as being due to the delay in several large contracts, notably the wiring of the Big Rapids, Michigan high school and a job at Foremost Graphics Company. Toering bid on the Big Rapids project on June 18, a \$1.8 million project. It expected that contract would be awarded in mid-July, but did not receive confirmation until August 1. It began working at Big Rapids on September 18. Toering expected to start work at Foremost Graphics in June or July. The contract for the project was not awarded until November. Due to these delays Toering was

¹³ See footnote 2.

¹⁴ Hagerty did not start work for Toering Electric until August 19, 1996.

able to transfer some employees from projects completed in the summer to Big Rapids and Foremost Graphics.

On September 3, however, it hired Mike Barr, an apprentice with no prior work experience in the electrical wiring field, who applied for work on August 29. On September 29, Toering hired David Seger as an apprentice and on October 7, it hired John Barr, an apprentice with no prior experience in the industry.¹⁵

Toering Electric has a policy that employment applications are only valid for thirty days from receipt. This policy is stated at the top of the application. However, Toering has made exceptions to this rule and accommodations for applicants it desired. Kenneth Palm filed an employment application with Toering on April 10, 1996 and started work for Respondent on July 15. John Hagerty applied and was hired on July 16, but was allowed to report to work on August 19. Kolin Shoemaker applied for a job on November 3, 1996 and was hired in February 1997.¹⁶

Analysis

Toering Electric Company and Foster Electric, Inc. are not single employers under the Act. However, David Toering and Dennis Van Wyck were acting as agents of both Toering and Foster in dealing with Union job applicants in 1995 and 1996.

The General Counsel alleges that Toering Electric and Foster Electric are single employers. The significance of such a finding would be that both companies would be jointly and severally liable to remedy the unfair labor practices of the other, *Emsing's Supermarket*, 284 NLRB 302 (1984).¹⁷

¹⁵ On September 16, 1996, Foster hired Shane Bostrum, an apprentice.

¹⁶ Respondent's explanation of these exceptions is as follows:

In April, Palm knew he was going to be laid off by his employer and filled out an application. Toering agreed to hire Palm when the lay-off took effect. Although there is some suggestion that Palm was hired to work on the premises of his former employer, this job lasted only an additional three months. Palm also worked on the Foremost Graphics project in late 1996 and/or early 1997. Consistent application of the 30-day rule would seem to have required repeated applications by Kenneth Palm. Despite the understanding with Toering, it's possible that in the months between his original application and his lay-off, Palm may have decided to work elsewhere.

Hagerty wanted to delay his starting date with Toering so he could move his family to the Grand Rapids area;

Shoemaker lived near Big Rapids, Michigan where Toering had a project to wire the High School. I would note, however, that Toering started working on the Big Rapids project on September 18, 1996, almost two months before Shoemaker filed his employment application (Tr. 593). If Toering consistently applied its 30-day rule for applications, it would have required Shoemaker to reapply every thirty days at the Big Rapids project.

Respondent suggests in its brief that Palm and Shoemaker's applications can be distinguished by the fact that they repeatedly showed continued interest in employment with Toering Electric. The same, however, can be said of Jendrasiak and the three union applicants whose resumes were submitted to Toering three times in the summer of 1996.

¹⁷ A closely related doctrine, "alter-ego", appears to be applied in instances where one company ceases doing business and a new company is started to continue the business of the

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The factors for evaluating whether two entities are a single employers are: 1) common ownership; 2) interrelation of operations; 3) common management and 4) centralized control of labor relations matters, *Denart Coal Co.*, 315 NLRB 850 (1994). No single factor is deemed controlling. The Board has stated that the single-employer relationship is characterized by the absence of the arm's length relationship found among unintegrated companies. It has also stated that the fundamental inquiry is whether there exists overall control of critical matters at the policy level, *Emsing's Supermarket*, *supra*.

While in the instant case there is obviously an ongoing relationship between Toering Electric and Foster, I conclude that the degree of interrelationship is not sufficient to deem them to be a single employer. Aside from David Toering's involvement, the management of the companies is not substantially identical. On a day-day basis the companies are managed independently. Foster is managed by Bruce Bartels and Fred Fairchild; Toering by David Toering, Dennis Van Wyck and Ward Stahmer. The two companies appear to operate largely as separate entities, often in different geographical markets, albeit in the same industry. While not all dealings between Toering and Foster appear to be arm's length (for example the loan of William Brooks), the two companies generally charge each other a market rate for services rendered.

At the time of the events in the instant case, David Toering and Dennis Van Wyck had some involvement in the hiring practices of Foster Electric. However, it appears that Foster retained a substantial degree of autonomy in its labor relations. For example, the record indicates that Bruce Bartels acted independently in failing to consider James Jendrasiak for employment on the basis of anti-union animus.¹⁸

As a practical matter the only implication of my failure to find Foster and Toering Electric a single employer is to make Toering Electric's assets unavailable to remedy the discrimination by Bruce Bartels, as an agent for Foster, against James Jendrasiak on September 22, 1995. Otherwise, both companies are liable because I find that David Toering and Dennis Van Wyck were acting as agents of both companies in discriminating against Union applicants on the other occasions alleged in the Complaint.¹⁹ When David Toering placed advertisements in the newspaper in August 1995, through American Careers, he was clearly acting as an agent for Foster as well as Toering Electric. His refusal to interview and consider James Jendrasiak for employment is imputable to Foster as well as Toering Electric. Since Dennis Van Wyck is generally consulted by Foster whenever it looks for electricians to hire, I deem Van Wyck also to be an agent of both companies when dealing with job applicants.

While there is no direct evidence that Toering was seeking employees for Foster in the defunct company, *Allcoast Transfer*, 271 NLRB 1374, 1378-79 (1984).

¹⁸ Foster apparently retained the services of Staffing, Inc., without the involvement of David Toering or anyone else at Toering Electric.

¹⁹ Although the General Counsel's brief does not argue that Toering and Van Wyck were agents of both companies in dealing with job applicants, there is no denial of due process in so concluding because this issue was fully litigated. For example, Respondents had the opportunity to rebut John Williams' testimony that David Toering asked him to look for employees for Foster, as well as for Toering Electric. Van Wyck's role in referring available electricians to Foster is in the record through the testimony of Bruce Bartels, as well as through the invoice for William Brooks' services, about which Van Wyck was questioned by the General Counsel.

summer of 1996, I conclude that David Toering and Dennis Van Wyck were acting as agents for Foster at this point in time as well. Foster hired electricians in the fall of 1996 and the record indicates that Foster checked with Van Wyck whenever it needed to hire electricians. The decision of Toering and Van Wyck to exclude the Union applicants from consideration for employment with Toering, necessarily would have excluded them from any consideration for any positions with Foster of which they may have become aware.

On August 22, 1995, Toering Electric and Foster Electric violated section 8(a)(1) and (3) in refusing to interview and consider James Jendrasiak for hire.

On August 20, Toering Electric placed an advertisement, through American Careers, in *The Grand Rapids Press* seeking journeymen and apprentice electricians. By virtue of the mention of the Muskegon area, I infer the ad was seeking employees for Foster as well as Toering. In response to the ad, James Jendrasiak went to American Careers, a temporary employment agency retained by Toering. John Williams, American Career's service manager interviewed Jendrasiak. Pursuant to David Toering's direction, Williams inquired as to Jendrasiak's union background.

After the interview, Williams sent Jendrasiak to Toering Electric's offices for another interview with David Toering. While Jendrasiak was in transit, Williams informed David Toering that Jendrasiak had worked through a union hiring hall. When Jendrasiak arrived he was told there was a misunderstanding and that he would not have an interview with David Toering. I conclude that the interview was canceled due to Toering's animus towards the IBEW.²⁰ This animus is established by Toering's directions to Williams during the interview.

David Toering had Jendrasiak fill out a Toering Electric application form. On it Jendrasiak indicated that he was a voluntary union organizer. Toering, in a subsequent call to John Williams, confirmed his animus towards the Union by telling Williams that he had had bad dealings with the Union previously and did not want to have to interview Jendrasiak.

Toering's assertion that Jendrasiak was not interviewed because Toering Electric didn't need any electricians is pretextual. David Toering was looking for employees for Foster, as well as for Toering Electric. At the time of Jendrasiak's visit, Foster was still looking for journeymen electricians, as evidenced by its subsequent employment of Roland Dye as an independent contractor, its advertisement of September 10, its continued search for employees through Staffing, Inc. and other electrical contractors, and its borrowing of electricians from Ottawa Electric and Toering Electric in September and October, 1995.

Respondent Foster violated section 8(a)(1) and (3) by refusing to interview and consider Mr. Jendrasiak for hire in late September 1995.

Foster ran an advertisement for a journeyman and third-year apprentice on September

²⁰ Respondents cannot rely on the misrepresentations in Jendrasiak's application as justification for its unwillingness to consider him for employment. First of all, they did not refuse to consider him for employment for making misrepresentations. Secondly, Foster's willingness to retain Brian Kelly despite his misrepresentation of his journeyman status, suggests that that it has a fair degree of tolerance for even more serious misrepresentations on the part of employees without a union background. Third, Respondent cannot rely on Jendrasiak's misrepresentations about his union affiliation because its inquiries in this regard violated the Act.

10, through Staffing, Inc. It is clear that well into the afternoon of September 22, when Jendrasiak set up his interview with Foster's operations manager, Bruce Bartels, that Foster was still in the market for journeymen electricians.

5 Bartels called Sandy Hammet the same afternoon to cancel the interview. He told Hammet that Jendrasiak's relationship with the Union was big trouble. In light of this, I reject any notion that the sudden availability of electricians from Ottawa Electric, another non-union contractor, was coincidental. I infer that when Bartels became aware of Jendrasiak's union
10 affiliation, he contacted or recontacted Ottawa and took whatever measures were necessary to insure that Ottawa would make its employees available to Foster on September 25. I therefore conclude that Foster's refusal to interview and consider Jendrasiak for hire was discriminatory.

Toering Electric violated section 8(a)(1) and (3) in failing to consider for hire any of the Union members whose employment applications it received in June and August 1996

15 Toering Electric concedes that it received the two packets of resumes sent by Jendrasiak in June and the one mailed in July. It also concedes that it gave none of the employees whose resumes it received the slightest consideration. Toering asserts that it ignored these resumes because they were copies and not up-to-date (Tr. 627). Therefore,
20 Dennis Van Wyck, Toering's office manager assumed the individuals were not interested in employment.²¹

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45 ²¹ Respondent's brief at page 2 suggests that Toering was entitled to ignore these applications because the IBEW's salting campaign is intended to drive non-union contractors out of business and to manufacture unfair labor practices, rather than to secure employment. However, Toering's witnesses did not testify that this was a factor in their decision to ignore the union resumes. Moreover, I infer that the IBEW has no interest in driving Respondents out of business if they become signatory contractors (See Exh. R-83). As discussed herein, I believe that Respondents experience with Local 275 is too limited for it to make a blanket assumption that the Union's salts would not accept jobs if they were offered.

I infer that the reason the resumes were ignored were that they were from Union salts and that therefore Respondent violated section 8(a)(1) and (3) in ignoring them. While some of the resumes were out-of-date, others, such as those of Bernard Hamstra, John Fekken and Wayne Harris, were relatively current.²²

If the Union and its members had no interest in employment with Toering, the company played right into their hands. Rather than ignore the resumes, Toering should have called the Union's bluff. It should have offered, for example, to interview those members whose resumes were relatively current and informed Jendrasiak it would only consider those applicants who provided a current resume or employment history within a reasonable period of time. Particularly in view of Jendrasiak's request to be informed if the resumes were deficient, Toering's failure to respond is deemed to be motivated by anti-Union animus.

Although the complaint alleges that Respondent[s] "has refused to hire, and/or has refused to consider for hire" each of the Union applicants, I believe that only the issue of whether they were considered for hire has been fully litigated in this stage of the proceedings. The question of whether Respondent would have hired any of the Union applicants is a matter left to compliance, *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995); *H. B. Zachry Co.*, 319 NLRB 967 (1995).²³ Respondent should have the opportunity to prove in the compliance stage that those employees hired after the Union applications were received had superior qualifications compared to the discriminatees, or that not all the discriminatees would have been hired because the number of openings available was not sufficient to accommodate them all.²⁴

²² Respondent suggests at pages 37-38 of its brief that it was entitled not to take the Union resumes seriously because none of the "applicants" took any individual initiative to seek work with Toering or filled out an adequate employment application. This ignores that fact that the ads placed in the *Grand Rapids Press* asked only that resumes be sent to a post office box. Toering could have contacted Jendrasiak and informed him that it would only consider those applicants who were willing to complete a company application form (assuming that is what it would have required for non-union employees responding to the ad). It did not do so.

²³ To the extent that deferring these issues to compliance is inconsistent with the decision in *N.L.R.B. v. Fluor Daniel, Inc.*, 102 F. 3d 818 (6th Cir. 1996), I would note that I am required to apply Board precedent. See, for example, *Operating Engineers Local 501*, 281 NLRB 419, 422 n. 10 (1986).

²⁴ Similarly, whether any of those who would have been hired sustained any damages is a matter left to compliance. I would note, for example, that Wayne Harris, the apprentice whose application was relatively current, experienced no periods of unemployment during the latter part of 1996. Of the 18 union applicants the only ones for which there is an indication of any periods of unemployment in 1996 are Bernard Hamstra, Gary Becklin and Raymond Rager. The fact that there may not be any damages due to some or all of the alleged discriminatees does not mean that Respondent did not violate the Act in failing to consider their application. John Fekken, for example, was employed throughout most of the Fall of 1996 in Battle Creek, a 2 1/2 hour one-way drive from his home. Fekken, who worked for non-union companies as recently as 1995, may well have preferred lower wages at Toering to a 5-hour round trip commute.

The Union apparently would not have supplemented the income of those employees who left their jobs to work for Toering at less than what they were earning (Tr. 292, 726). However, one cannot necessarily assume that those members who were employed would not have accepted a job with Toering Electric. Gary Becklin, a Union journeyman, was earning \$14.45 per hour at the time of hearing, possibly comparable to what Toering would have paid

Continued

Toering may have some reasonable grounds for doubting the good faith of the Union in submitting the applications. None of IBEW members offered jobs as the result of the prior settlement came to work for Respondent. However, I conclude that Toering is not entitled on the basis of this limited experience with the Union to assume that any Union applicant is not interested in employment. It may be that at some point if other offers are made and no Union members accept jobs with Respondents, that such an assumption would be reasonable.²⁵

The General Counsel's allegation that David Toering unlawfully interrogated David Seger with regard to union affiliation is dismissed.

At the commencement of the hearing the General Counsel moved to amend his complaint to allege that David Toering interrogated David Seger about his union affiliation in September 1996. I grant the motion and dismiss this allegation because that it rests solely on the testimony of Seger. I consider Seger's testimony, where uncorroborated, insufficiently reliable to support any factual findings.

Conclusions of Law

1. By refusing to interview and consider James Jendrasiak for hire on or about August 22, 1995, Respondents Toering Electric and Foster Electric have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By refusing to interview and consider James Jendrasiak for hire on or about September 22, 1995, Respondent Foster violated Section 8(a)(1) and (3).

3. By refusing to consider for hire James Jendrasiak, Patrick Cosgrove, Bernard Hamstra and Richard Newville, since June 10, 1996, Respondents have violated section 8(a)(1) and (3).

4. By refusing to consider for hire the 18 Union applicants, whose resumes were received on August 3, 1996, Respondents have violated section 8(a)(1) and (3).

5. Respondents, through David Toering, did not unlawfully violate section 8(a)(1) in interviewing David Seger in September 1996.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the

him. John Hagerty, a non-union applicant, was hired by Toering at \$15.50 in July 1996, with an out-of-state journeyman's license.

²⁵ It appears that Respondent may have had reasonable grounds to assume that Geralyn Spofford was not applying for a job in good faith in view of her failure to respond to its earlier job offer. However, this matter has not been fully litigated, and is therefore more appropriately left for resolution to the compliance stage of the proceedings.

following recommended²⁶

ORDER

5 The Respondents, Toering Electric Company, Grand Rapids, Michigan and Foster Electric, Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Failing and refusing to consider for hire job applicants on the basis of their union affiliation or Respondents' belief or suspicion that they may engage in organizing activity if they are hired.

15 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

20 (a) Consider for hire the employee-applicants named below and make whole those whom it would have hired for any losses they may have suffered by reason of the Respondents' discriminatory refusal to consider them for hire, including amounts they would have earned on any job to which Respondents would have subsequently assigned them. Offer those employee-applicants named below, who would currently be employed by for the Respondents' unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any of the rights or privileges to which they would have been entitled if they had not been discriminated against by Respondents. In all instances, backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

35 James Jendrasiak, Gary Becklin, Mark Butzow, Patrick Cosgrove, Jeffrey Engel, John R. Fekken, Bernard Hamstra, Wayne Harris, James Leenhouts, Richard Newville, Leonard Petznik, Raymond Rager, George Robinson, Jr., Douglas Scott, Jeffrey Stadt, Leo Smith, Geralyn Spofford and Daniel Watters.

40 (b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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²⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its offices in Grand Rapids, Michigan and Muskegon, Michigan, copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 12, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. October 8, 1997.

Arthur J. Amchan
Administrative Law Judge

²⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to consider for employment job applicants because they are union members or sympathizers, or because they indicate that they intend to engage in union organizing activities if they are hired.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL consider for employment the employee-applicants named below and make whole, together with interest, those who would have been hired, for losses they may have suffered by reason of our discriminatory refusal to consider them for hire in 1995 and/or 1996 in the manner described in the Decision and Order, and WE WILL offer those employee-applicants named below, who would currently be employed but for our unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

James Jendrasiak, Gary Becklin, Mark Butzow, Patrick Cosgrove, Jeffrey Engel, John R. Fekken, Bernard Hamstra, Wayne Harris, James Leenhouts, Richard Newville, Leonard Petznik, Raymond Rager, George Robinson, Jr., Douglas Scott, Jeffrey Stadt, Leo Smith, GERALYN Spofford and Daniel Watters.

TOERING ELECTRIC COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

FOSTER ELECTRIC COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3244.